

**Mohd Azmi bin Ghazali v
Public Prosecutor**

HIGH COURT (TEMERLOH) — CRIMINAL APPEAL NO 41-20 OF 1999
NIK HASHIM J
18 AUGUST 1999

Criminal Procedure — Sentence — Detention of drug dependant — Escape from lawful custody while resident at rehabilitation centre — Conviction under s 19(3) of Drug Dependants (Treatment and Rehabilitation) Act 1983 — Sentence of 30 months' imprisonment plus whipping imposed — Drug dependant further ordered to be sent back to rehabilitation centre upon serving sentence — Whether order lawful — Whether period of imprisonment deemed residence at rehabilitation centre — Drug Dependants (Treatment and Rehabilitation) Act 1983, ss 19(3) & 21

Criminal Procedure — Sentence — Whipping — First offender and pleaded guilty — Reduction on account of plea of guilty — Whether imposition of maximum of three strokes justified — Drug Dependants (Treatment and Rehabilitation) Act 1983 s 19(3)

The appellant, a drug dependant, was ordered to undergo treatment and rehabilitation for a period of two years at Pusat Serenti Jerantut ('the centre'). Whilst serving the detention for about seven months, the appellant on 12 February 1999 bolted from the centre, but was arrested six days after the escape. He pleaded guilty to the charge of escaping from lawful custody while he was resident at the centre, an offence punishable on conviction to imprisonment for a term not exceeding five years or to whipping not exceeding three strokes or to both under s 19(3) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 ('the Act'). The learned magistrate sentenced the appellant to 30 months imprisonment and three strokes of whipping and thereafter appellant was also ordered to be sent back to the centre for rehabilitation. The appellant claimed that the sentence was too harsh.

Held:

- (1) The learned magistrate had imposed the maximum three strokes allowed by law without giving any regard to the fact that the appellant was a first offender and had pleaded guilty to the charge. The extent of the reduction on account of a plea of guilty would be between one-quarter and one-third of what otherwise would have been the sentence (see p 237A-G); *Mohamed Abdullah Ang Swee Kang v PP* [1988] 1 MLJ 167 followed. Moreover, whipping is not a mandatory sentence. One stroke of whipping besides 30 months imprisonment is sufficiently deterrent in the circumstances of this case (see p 241E-F).
- (2) The order of the magistrate sending the appellant back to the centre after serving the 30 months' imprisonment was unlawful, being contrary to s 21 of the Act as the period of any imprisonment served shall be deemed to be residence at the centre. The appellant was sentenced 30 months imprisonment,

- A thus exceeding the detention order of two years for treatment and rehabilitation. Therefore, at the end of the two and a half years' imprisonment, the appellant, cannot be ordered to be sent back to the centre as his supposed two year period of residence at the centre had already been spent and completed while he was serving the two and a half year sentence in the prison (see p 241G–242D).
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[Bahasa Malaysia summary]

- C Perayu, seorang penagih dadah, diperintahkan untuk menjalani rawatan dan pemulihan untuk tempoh dua tahun di Pusat Serenti Jerantut ('pusat tersebut'). Semasa menjalani tahanan untuk tempoh tujuh bulan, perayu pada 12 Februari 1999 telah cabut lari dari pusat tersebut, tetapi telah ditangkap enam hari setelah percubaan melarikan diri. Beliau mengaku salah kepada tuduhan melarikan diri daripada jagaan sah semasa beliau adalah penghuni di pusat tersebut, suatu kesalahan boleh dihukum, jika disabitkan, dengan penjara untuk tempoh tidak melebihi lima tahun atau sebat tidak melebihi tiga kali atau kedua-duanya di bawah s 19(3) Akta Penagih Dadah (Rawatan dan Pemulihan) 1983 ('Akta tersebut'). Majistret yang arif telah menjatuhkan hukuman ke atas perayu untuk 30 bulan penjara dan tiga kali sebatan dan kemudian perayu juga diperintah kembali ke pusat tersebut untuk pemulihan. Perayu mendakwa bahawa hukuman tersebut adalah terlalu keras.
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Diputuskan:

- F (1) Majistret yang arif telah mengenakan tiga sebatan maksimum yang dibenarkan di bawah undang-undang tanpa mengambil kira perayu adalah pesalah kali pertama yang telah mengaku bersalah kepada tuduhan tersebut. Takat pengurangan di atas akuan bersalah adalah antara suku dan satu pertiga atas suatu hukuman (lihat ms 241C–D); *Mohamed Abdullah Ang Swee Kang v PP* [1988] 1 MLJ 167 diikuti. Tambahan lagi, sebatan bukannya sebatan mandatori. Satu kali sebatan di samping 30 bulan penjara adalah pencegahan yang secukupnya di dalam keadaan-keadaan kes ini (lihat ms 241E–F).
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- H (2) Perintah majistret menghantar perayu kembali kepada pusat tersebut setelah menjalani 30 bulan penjara adalah tidak sah, bercanggah dengan s 21 Akta tersebut memandangkan tempoh penjara yang dijalani akan dianggap sebagai tempoh tinggal di pusat tersebut. Perayu telah dijatuhkan hukuman 30 bulan penjara, iaitu melebihi perintah tahanan dua tahun untuk rawatan dan pemulihan. Oleh demikian, pada akhir dua setengah tahun penjara, perayu tidak boleh diperintahkan dihantar kembali ke pusat tersebut memandangkan tempoh dua tahun tempoh tinggal yang sepatutnya di pusat tersebut telah dihabiskan dan selesai semasa beliau menjalani hukuman dua setengah tahun pemenjaraan di penjara (lihat ms 241G–242D).]
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Notes

For cases on sentence, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2475–3049.

For cases on whipping, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 3029–3043.

Cases referred to

Mohamed Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167 (folld)

Legislation referred to

Drug Dependants (Treatment and Rehabilitation) Act 1983 ss 6(1)(a), 8, 9, 19(3), 21

Appellant in person.

Iskandar Ali bin Dewa (Deputy Public Prosecutor) for the prosecution.

Cur Adv Vult

Nik Hashim J:*Introduction*

The appellant, a drug dependant, was ordered by way of an order in Borang 3 for detention for treatment and rehabilitation ('the order') by the learned magistrate to undergo treatment and rehabilitation for a period of two years at Pusat Serenti Jerantut ('the centre') and was further ordered 'selepas itu menjalani jagaan lanjutan mengikut peruntukan-peruntukan Akta' under s 6(1)(a) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 ('the Act').

Whilst serving the detention for about seven months, the appellant on 12 February 1999 bolted from the centre, but was arrested six days after the escape. He pleaded guilty to the charge of escaping from lawful custody while he was resident at the centre, an offence punishable on conviction to imprisonment for a term not exceeding five years or to whipping not exceeding three strokes or to both under s 19(3) of the Act.

Appeal against sentence

On being satisfied that the appellant understood the nature and consequences of his plea of guilty without qualification against the offence charged, the learned magistrate, after hearing the mitigation pleas by the appellant, recorded the conviction and sentenced the appellant to 30 months imprisonment and three strokes of whipping and there after 'beliau juga diperintahkan dihantar semula ke Pusat Serenti Jerantut untuk pemulihan setelah selesai hukuman'. This means that after serving the sentences of imprisonment and whipping, the appellant was also ordered to be sent back to the centre for rehabilitation.

A *Decision*

Before me, the appellant, who was unrepresented, claimed that the sentence was too harsh and asked the three strokes of whipping be reduced. Having considered the arguments from both sides, I allowed the appeal. In respect of whipping, I reduced it to one stroke, and the order of sending the appellant back for rehabilitation after serving the imprisonment was set aside. With regard to 30 months imprisonment, I found the sentence was not manifestly excessive. Hence, I affirmed the sentence. To my mind, the imposition of maximum three strokes of whipping and the order of sending the appellant back to the centre for rehabilitation after serving the term of imprisonment are not justified and erroneous in principle, and therefore, they must be set aside.

In this particular case, the learned magistrate had imposed the maximum three strokes allowed by law without giving any regard to the fact that the appellant was a first offender and had pleaded guilty to the charge.

D It is generally accepted that the extent of the reduction on account of a plea of guilty would be between one-quarter and one-third of what otherwise would have been the sentence (per Mohamed Azmi SCJ in *Mohamed Abdullah Ang Swee Kang v PP* [1988] 1 MLJ 167 (SC)). The above principle has been consistently followed by the courts in respect of pleading guilty cases. It would appear from the record that the learned magistrate did not direct his mind to this well-established principle when he imposed the maximum strokes of whipping on the appellant.

Moreover, the first choice of punishment under s 19(3) of the Act is imprisonment, and by the usage of the word 'or' before the words 'to whipping' in the section, whipping is not a mandatory sentence.

F Therefore, to impose the maximum three strokes of whipping on the appellant in addition to imprisonment is, in my view, manifestly excessive and indeed unsuitable to the facts of the case. Although the act of escaping from lawful custody is a serious offence which must be dealt with seriously, nevertheless I consider one stroke of whipping besides 30 months imprisonment is sufficiently deterrent in the circumstances of this case.

G *Section 21 of the Act*

Now I come to the magistrate's order of sending the appellant back to the centre after serving the 30 months' imprisonment. This order is unlawful, being contrary to s 21 of the Act which states:

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- (1) Where a person who is undergoing residence at a Rehabilitation Centre ..., is sentenced by any court to any term of imprisonment ..., such imprisonment ... shall take precedence over the residence ..., and the period of imprisonment ... served shall be deemed to be residence at a Rehabilitation Centre ..., and if upon completion of such period of imprisonment ... there still remains unexpired any portion of the period for which he had been ordered to reside at a Rehabilitation Centre ... he shall be required to reside at a Rehabilitation Centre ... for such unexpired portion thereof.

- (2) The foregoing provision of this section shall not apply to a person who is admitted to a Rehabilitation Centre under s 8 or 9.

(Emphasis added)

The above provisions are clear in that the period of any imprisonment served shall be deemed to be residence at the Centre. Thus, s 21 of the Act is applicable to the present case. The learned Magistrate had obviously overlooked the section and hence had committed a serious error of law when he made the order. This order should not be confused with the earlier order, 'selepas ini menjalani jagaan lanjutan mengikut peruntukan-peruntukan Akta' which was properly imposed under the then provision of s 6(1)(a) of the Act which has now been amended. In the instant case, the appellant was sentenced to two and a half years, ie 30 months imprisonment, thus exceeding the detention order of two years for treatment and rehabilitation made by the learned magistrate in Borang 3. Therefore, at the end of the two and a half years' imprisonment, the appellant (who did not fall under s 8 or 9 of the Act as he was not a volunteer to be admitted at the centre), cannot be ordered to be sent back to the centre as his supposed two year period of residence at the centre had already been spent and completed while he was serving the two and a half years sentence in the prison. Therefore, the two and a half years' imprisonment served shall be deemed to be residence at the centre. But under s 6(1)(a) of the Act, the appellant can be ordered to reside at the centre only for a period of two years and in this case, he has another 17 months more to complete the residence at the centre after having resided there for seven months before his escape. Thus, by serving the 30 months' imprisonment, the remaining 17 months residence at the centre is deemed served. Since there is no more unexpired period left for which he had been ordered to reside at the centre, the learned magistrate cannot send the appellant back to the centre for rehabilitation. The order has no legal basis. Accordingly, the order of the learned magistrate 'beliau juga diperintahkan dihantar semula ke Pusat Serenti Jerantut untuk pemulihan setelah selesai hukuman' cannot stand and must therefore be set aside.

To that extent the appeal is allowed.

Whipping reduced. Order that appellant be sent back to the centre after imprisonment set aside.

Reported by Benjamin Yong

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